IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 198

M. KRAUS & BROS., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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INDEX

CITATIONS

Cases:

Statutes, Regulations and Miscellaneous:

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Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, and the dissenting opinion of Hincks, *D.J.*, are reported in 149 Fed. 2nd 773 (R. 271-6, 277).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347a), and as modified, pursuant to the Act of March 8, 1934 (48 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

The judgment of the Circuit Court of Appeals was entered on May 31, 1945 (R. 278). The petition for writ of certiorari was filed on July 5, 1945. It was granted on October 8, 1945 (R. 279).

Questions Presented

The petitioner corporation was convicted for selling turkeys and chickens above wholesale ceiling prices to certain retail butchers during the three days prior to Thanksgiving, 1943. In all cases the prices charged therefor were concededly the official ceiling prices established by the Price Administrator under the Emergency Price Control Act of 1942. (Government brief in opposition to Petition for Certiorari, p. 5.)

A regulation of the Price Administrator (Sec. 1429.5 of Maximum Price Regulation No. 269 issued November 7, 1942, which was re-issued as Revised M. P. R. No. 269 on December 18, 1942, and was re-issued with amendments on October 8, 1943*, prohibited evasion of price limitations by direct or indirect methods, but did not, unlike many other similar regulations relating to other commodities which had been issued from time to time since the commencement of price regulation, specifically prohibit tying-agreements, conditioned sales or combination sales.

In connection with each sale of poultry, upon which petitioner corporation was convicted, certain of its subordinate employees offered to sell poultry parts, admittedly useful in food-making, consisting of chicken feet and chicken skin**. In each case the offer was accepted without question, and no request to buy the chickens or turkeys separately was made by any purchaser. The goods were then billed and delivered. No ceiling prices had been fixed by the Price Administrator at the time for either chicken feet or chicken skin.

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* 7 Fed. Reg. 9202, 9204; 10708, 10709; 8 Fed. Reg. 13813, 13814.

** Chicken gizzards were originally involved in the case, but are of no present interest because they were sold only to a witness whose testimony the jury flatly rejected in acquitting upon the counts involving sales to him (R. 245).

The case was tried throughout on the theory that the offense was, as charged in the Informations (R. 2-9), the conditioning of the sale of poultry upon the simultaneous purchase of chicken feet or chicken skin unwanted by the purchasers. Aside from the simultaneous sales of the poultry and poultry parts, the proof offered in support of these allegations consisted of testimony on the part of some retail butchers to the effect that they had not sold the greater part of the chicken feet and chicken skin purchased.

The trial court refused to permit the defense to rebut this testimony as to lack of demand for chicken feet and chicken skin, or to prove that such poultry parts had been sold to the original purchasers at prices which were not excessive, which proof it offered to make through many witnesses familiar with market demand and prices. This rejection of evidence was on the theory that the sole issue in the case was whether or not the purchasers had been required to purchase secondary poultry commodities for which they had no substantial use (R. 39, 161-4).

The first question presented, therefore, is whether the trial court committed reversible error in sustaining the Informations which framed the issue without respect to the excessiveness *vel non* of the prices charged for the poultry parts, and in thereby refusing to permit the defense to establish, if it could, that a price which was not excessive had been charged for the poultry parts, for which no official ceilings had been established.

Assuming that the first question presented is answered in the negative, the second question presented is whether the petitioner corporation was properly convicted for wilfully selling and delivering articles in violation of the Price Control Act of 1942, in view of the fact that no witness testified that any officer of the corporation or even that any branch manager thereof had made the allegedly conditioned sales to him.

The third question presented arose as follows: The prosecutor attempted to refresh the recollections of three of his witnesses by having them read affidavits purportedly given by them prior to the trial either to O. P. A. investigators or to himself, and also read, over the objection of defense counsel, selected questions and answers therefrom to the witnesses in the presence of the jury. The trial court denied the request of defense counsel (R. 91) to examine these papers, and explicitly stated that he did so, not in the exercise of discretion, but because in his view the prosecutor had an absolute right to thus proceed (R. 91). The questions and answers read by the prosecutor in the presence of the jury disclosed that the interrogation by affidavit involved a number of close distinctions, such as that between M. Kraus & Bros., Inc. and M. Kraus personally. The context, if defense counsel had been permitted to examine it, might easily, therefore, have reconciled the answers of the witnesses upon the trial and before the trial, to the extent, if any, that they differed. It might also have suggested that these ill-educated witnesses, who did not write out their own affidavits, had been imposed upon by O. P. A. investigators, over-anxious, for some reason or other, to convict Max Kraus personally.

The fourth question presented arose as follows: In summing up to the jury the prosecutor told it that the maximum fine upon each count was $1,000 (R. 233), whereas in fact it was $5,000, and the trial court actually imposed a fine of $2,500 upon each of the nine counts upon which verdicts of guilty were found.

Statute and Regulation Involved

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

"SEC. 2.(a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

"SEC. 2.(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

"SEC. 4.(a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *."

"SECS. 203 and 204 provide for a protest and review procedure, which, if not availed of within the times specified, precludes attack upon the validity of a regulation.

"SEC. 205.(b) Any person who wilfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *."

SEC. 205.(a), (e) and (f) provide respectively for injunctions against violations, triple damage suits ($50 plus

reasonable attorney's fees and costs, minimum), and licensing, as sanctions to enforce the Act.

Revised Maximum Price Regulation No. 269, in effect during November, 1943 (8 Fed. Reg. 13814), provides in pertinent part:

> "SEC. 1429.5. *Evasion.*—Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

Statement

The petitioner corporation and its president, Max Kraus (R. 177), who was also its controlling stockholder, were charged in an Information containing six counts (C117-64) with "unlawfully, wilfully and knowingly" evading, in contravention of a regulation of the Price Administrator, the provisions of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, by "demanding, compelling and requiring" purchasers of poultry to buy certain quantities of poultry parts in order to obtain the poultry (R. 2-5).

A second Information (C117-65) charged six additional violations of the same character to the petitioner corporation only (R. 6-9).

In neither of the Informations was it alleged in any count that an excessive or above-ceiling price was charged for the poultry parts. All of the transactions were alleged to have taken place in November, 1943, all but two (on

which there were acquittals) during the three days preceding Thanksgiving, 1943. The two Informations were consolidated for the purposes of trial.

No proof was offered upon count 5 of the first Information (C117-64), and it was dismissed on motion of the Government at the end of its case (R. 159). The individual defendant, Max Kraus, the president and controlling stockholder of the petitioner corporation, was acquitted by the jury upon all of the remaining counts of the first Information, which alone named him as a defendant (R. 245). The petitioner corporation was acquitted by the jury (R. 245) on counts 1 and 2 of the second Information against it alone (C117-65). It was convicted upon all of the remaining counts of the second Information, to wit, counts 3, 4, 5 and 6, and upon all five counts of the first Information (C117-64) which the trial court had not dismissed (R. 245).

In summing up to the jury the prosecutor, without being corrected by the court, advised the jury that the maximum fine upon any count would be $1,000 (R. 233). In fact it was $5,000. The court fined the petitioner corporation $2,500 on each of the nine counts upon which it was convicted, and provided that the sentences should be cumulative (R. 246-7). This made a total of $22,500.

Petitioner corporation was a wholesale dealer in meat and poultry (R. 164-5). Before the war its gross business had run from 7 to 7½ million dollars a year (R. 178). By 1943, by which time, as is common knowledge, "black marketeers" in meat had greatly increased their volume of business, its business had declined to about 4 million dollars a year (R. 178). Max Kraus, the individual defendant, at the time of the trial was 65 years old. He had been in the meat and poultry business for 37 years, and the petitioner corporation, M. Kraus & Bros., Inc., had been in business 20 years (R. 164-5).

The petitioner corporation had two places of business.

As alleged in the Informations, its principal place of business was at 20 Tenth Avenue, New York City, at which the general administrative offices were located, together with a railroad siding for receiving deliveries by rail. A branch establishment, devoted solely to the handling of truck shipments of poultry, was located at 410 West 14th Street, at Ninth Avenue, New York City. At the Tenth Avenue place all kinds of meat and provisions, as well as all poultry coming in by rail, were handled, and there existed separate departments for the handling of beef and lamb with a manager in charge of each (R. 166). The head salesman at the 14th Street branch was Nathan Lotto, and the sales manager at the main office, Tenth Avenue, was William Harris (R. 165-6). It does not definitely appear from the record how many employees petitioner corporation had, but one witness testified there were "15 or 20, maybe 30", that "it was like Swift & Co." (R. 93). In fact there were about 35.

Max Kraus, as President and controlling stockholder of petitioner corporation, occupied himself with administrative duties. Persons who came down to buy poultry or meats would not ordinarily come in contact at all with him or with the administrative force, since the administrative offices were located on the floor above the ground floor. Max Kraus himself had not sold any meat or poultry or poultry parts in 20 years (R. 167). He had been the sole New York representative appointed by the American Meat Association upon the national industry committee functioning with the O.P.A. in Washington (R. 167-8). He had been president of the Marketmen's Association of the Port of New York which had to do with the poultry and meat industries (R. 220). Five witnesses of high standing in the business world, including officials of a number of nationally known concerns which had done business with him for long periods of time, testified that his reputation

for obedience to law and truth and veracity was "excellent", "splendid", and "no one with a better reputation" (R. 216-228).

The Government's case was based upon the testimony of seven retail butchers in the City of New York who had purchased poultry and poultry parts from M. Kraus & Bros., Inc. during the month of November 1943; and, with the exception of one witness upon whose transactions the jury acquitted, during the three days preceding Thanksgiving 1943, to wit, November 22, 23 and 24, 1943. Only one of these witnesses testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he had said he did not want. This witness, Abraham Mandel, was also the only witness who testified that his dealings, in respect of the allegedly conditioned sales, had been with anyone who was not clearly a subordinate employee of the petitioner corporation, he having testified that he had dealt with Nathan Lotto, variously described by him as the bookkeeper and manager at the 14th Street branch (R. 17). The jury categorically rejected the testimony of this witness* when it acquitted upon counts 1 and 2 of the second Information (C117-65) (R. 245).

The Government also suggested that certain of its witnesses had dealt with Max Kraus individually, who was apparently named as a defendant in the first Information (C117-64) on this theory. Two of the witnesses named in this Information, Harry Moskowitz and Max Braverman, denied that they had dealt with Max Kraus individually (R. 89, 92, 99-100, 112, 116, 119, 128-130, 135, 140). The other witness, Samuel Zweben, was asked no more than whether he *saw* Max Kraus on November 22 or November

* Mandel was on probation upon a suspended sentence of six months, imposed upon him for an O.P.A. violation (R. 46).

24. He testified that he did not speak to him (R. 153). In view of Max Kraus' position as head of a concern doing many millions of dollars gross business a year, it is absurd to suppose that he was waiting on retail butchers to sell them poultry parts when their total purchases thereof amounted to less than $200 (R. 39).

The transactions allegedly had by the witness Abraham Mandel were charged to the corporation only (Information C117-65), indicating that the statements he must have given to the O.P.A. investigators and to the prosecuting attorney did not implicate Max Kraus personally. Nevertheless, this witness stated that on one of the occasions, when he said he was doing business with Nathan Lotto, Max Kraus "happened to be in the office there", and volunteered the conclusion, "to see just what was going on, what Mr. Nathan was doing" (R. 18). Almost immediately, however, this witness qualified his statements by saying "if I recall", and "*I think* that Mr. Kraus * * * knew just what was going on" (R. 18). (Italics ours.)

The Government's witnesses, other than Abraham Mandel (whom the jury flatly disbelieved), all testified to much the same effect as to the character of their transactions, in respect of the allegedly conditioned sales, with subordinate employees of the petitioner corporation. They were offered poultry parts, such as chicken feet or chicken skin, at the time they purchased turkeys or chickens. They accepted the offers, were billed for the poultry parts, accepted delivery, and paid therefor. None protested, offered to return the poultry parts, or asked to buy turkeys or chickens separately (R. 54-8, 60, 67-68, 70, 74-75, 80, 85-87). One of the witnesses, Samuel Zweben, testified that he was asked "How about some chicken skin?" and "How about some chicken feet?", and that he said on both occasions, "I will take some" (R. 144-5, 150). Another of the witnesses, Harry Moskowitz, testified that his father had previously given

the order on the telephone, and that he went down to the Kraus establishment simply for the purpose of picking up what his father had ordered. Thus he did not know of his own knowledge what had been ordered. The Government did not call his father as a witness (R. 108-113).

All of the Government's witnesses (with the exception of Abraham Mandel, whom the jury disbelieved) testified that they had some demand for the poultry parts which they had purchased at or about the price they had paid for the parts (R. 107, 87-88, 58-9, 69-70, 72-3, 76-7, 145, 154). Abraham Mandel had testified that some people, particularly Jewish people, were accustomed to using chicken feet as stock to make the soup richer (R. 28). Jules Klein corroborated this testimony (R. 72). There was no dispute on the point. Likewise, as to chicken skin, the testimony was undisputed that the fat to be derived therefrom was a useful edible product customarily employed in the making of chicken salami and patties, and in place of lard (R. 184).

Under war conditions there was a big demand for anything edible (R. 107, 87-88, 59-60). Gizzards, for example, were being sold not only for human consumption but for animal food (R. 60). One of the Government's witnesses, Max Braverman, testified that in the very poor neighborhood in which his store was located there was no question but that he could sell whatever he could get, and that he in fact sold all of the chicken feet he purchased from the petitioner corporation (R. 87-88). The other Government witnesses, however, testified that they were unable to sell or did not bother to sell the bulk of the poultry parts purchased, but gave them away to customers, restaurants, charitable institutions or fat renderers. Two of the Government's witnesses (including Abraham Mandel whom the jury did not believe), testified that they had dumped their purchases of poultry parts (R. 112, 25).

During the testimony of the first witness, when discussion

was taking place concerning whether or not there was an official ceiling price on gizzards at the time they were sold to Abraham Mandel, the trial court said, "Does the price of gizzards or its coverage* have anything to do with this case? As I understand it, your client is charged with having forced this man to buy gizzards in order to bill up the price. I don't care whether they are covered by the regulations or not. He is not charged with violating the price of gizzards but billing up the price of chickens" (R. 38). The prosecutor then said, "The issue here, I think your Honor, is whether the produce was wanted or wasn't wanted, so what the ceiling is I do not think is connected to this case at all * * *." The trial court definitely agreed with this because when defense counsel read into the record a ceiling price for gizzards which he mistakenly claimed was in effect at the time of the trial, the court said, "*Well, I have no interest in that. I wouldn't care if it was fifteen dollars*" (R. 39). (Italics added.)

In opening to the jury the prosecutor had said that there was just one issue of fact in the case, "Was this defendant a black market operator or wasn't he? Did he sell turkeys and chickens above the ceiling, or didn't he? That is all there is, there isn't any more" (R. 13).

After the prosecution had been permitted to introduce its testimony concerning the alleged worthlessness of chicken feet, gizzards and chicken skin, and the lack of demand therefor, the defense called David M. Bungard, a retail butcher who had bought chicken feet and chicken skin from the petitioner corporation (R. 161). The trial court asked why the testimony was being put in and what it was supposed to prove. Defense counsel said (R. 162), "I in-

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* Actually there was no regulation fixing the ceiling price of gizzards in November, 1943. Defense counsel's statement in this connection must be taken to relate to a later time.

tend putting in testimony here to show that there is and has been a demand for chicken skins, chicken feet, gizzards, that they are customarily sold; that they are bought; that they are dealt and traded in. The Government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." The trial court said it would sustain an objection to this testimony, and the prosecutor thereupon objected (R. 162).

The witness was then asked whether he sold chicken feet in his store, and he testified that he did. The prosecutor objected, and the court sustained the objection (R. 162).

Defense counsel then said, "Again I call to your Honor's attention the fact that similar testimony from the opposite viewpoint, that chicken feet are not in demand, was offered and allowed in evidence" (R. 162). The trial court said: "I do not think the Government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. *The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores*" (R. 162). Defense counsel observed that he did not think this was the question in the Information. The trial court said, "*Well, maybe you don't think so but that is going to be the question in this case.* (Italics added.) Now I have sustained an objection to this kind of testimony. You have an exception in the record, and there is no use wasting any time about it." Defense counsel excepted (R. 162-3).

Defense counsel then asked a ruling "*before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the*

like. I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections" (R. 163). (Italics added.)

The trial court ruled, *"It is not only unnecessary but I direct you not to do it. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it"* (R. 163).

Defense counsel then called Benjamin W. Reiner (R. 163), a retail butcher, and asked him if he had purchased any chicken feet from Kraus. The prosecutor objected, and the court sustained the objection, saying, *"Did you understand what I said?"* Defense counsel said, *"You said 'sustained'. I understood that your rulings were going to be the same in all of these witnesses that I put on the stand, yes."* The trial court then said, *"Well, didn't you hear me tell you that I direct you not to put them on the stand; that I have given you an exception to the ruling to any such testimony?"* Defense counsel replied, *"I did not hear that portion of your statement, I am sorry. Now that I understand you perfectly on that, I will not put any other witnesses on the stand to testify to that effect"* (R. 164). (Italics added.)

The defendant Max Kraus then testified. He stated that chicken feet and chicken skin and chicken and turkey gizzards and all sorts of poultry parts were sold in his place (R. 168-9). He stated that he had bought gizzards and chicken skin, and said that the concern processed chicken feet itself (R. 169). He denied having had any dealings with any of the witnesses mentioned in the Informations in respect of having personally sold them poultry or poultry part. (R. 170-174). *He denied ever having instructed salesmen or any one else working for him to make the acceptance of poultry parts a condition of the sale of poultry* (R. 177).

On cross examination he was asked about market prices of chicken skin and chicken feet and the demand therefor, and testified that there was a solid demand for chicken skin at 30¢ a pound, and that during the war the general public was willing to buy chicken feet for soup and that they were used to make gelatines and for chicken feed (R. 182-7).

The defense thereupon recalled David M. Bungard (R. 194), and he was allowed to testify as to the price he himself obtained for chicken feet (R. 195) which was from 15 to 20¢ a pound. He further testified that he tried to get chicken feet, and knew that they were sold in other stores throughout the city. He was not familiar, however, with the price of chicken feet as sold by other stores (R. 195).

Nathan Lotto was the last witness for the defense (R. 197). He testified that he more or less managed the 14th Street branch (R. 197). He denied having participated in any of the transactions alleged in the Information upon which the jury convicted (R. 199-203). He testified that he never refused to sell any customer chickens because he would not take chicken feet, gizzards or chicken skin (R. 198, 203). He admitted sometimes asking customers to buy chicken feet or chicken skin when the customer asked for chickens (R. 198-9). He never required anybody as a condition of a sale of poultry to them to buy chicken feet or gizzards, and no other employee in his presence did so. Max Kraus never told him not to sell chickens or turkeys unless he could sell chicken feet, skin or gizzards with them (R. 203).

The chicken skin sold by the petitioner corporation was bought from the Blue Diamond Poultry & Egg Company. Max Kraus testified to his belief that the corporation paid 23½ or 24½¢ a pound for it, and stated that he had the bills with him (R. 181). It was sold for 30¢ a pound (R. 185). Chicken skin is a by-product which is taken off by

the people which pack poultry in cans for the Government (R. 192). Petitioner did no skinning of chickens (R. 181).

All of the poultry sold by Kraus as alleged in the Informations was in the O.P.A. category "dressed" poultry, and therefore was sold with the feet on. The chicken feet, which are the subject matter of the sales alleged in the Informations, were obtained by petitioner corporation from its processing of other poultry (R. 180-181). Chicken feet in large supply were not available prior to the war but came into supply coincident with the demand for poultry parts evidenced by the opening of stores exclusively devoted to the sale of cut-up poultry (R. 186, 193-4, 78-79).

The Government, in examining its witnesses Max Braverman, Harry Moskowitz and Samuel Zweben, attempted to refresh their recollections and impeach them by the use of prior affidavits allegedly contradictory to their testimony at the trial. These affidavits were marked for identification but were not received in evidence and have not been reproduced in the printed record. Enough appears therein, however, to show their general tenor and the prosecution's objectives in employing them, but certainly not enough to justify the strictures in the prevailing opinion of the Circuit Court of Appeals based upon the assumption that the O.P.A. investigators who wrote out the affidavits reproduced the witnesses' statements and purport with complete fidelity, and the further unjustified assumption that such affidavits became affirmative evidence in the case.

In the case of the witnesses Braverman and Moskowitz the principal objective was to obtain an admission that, contrary to their positive testimony on the trial, they had dealt with Max Kraus personally in the matter of the allegedly conditioned purchases, a very unlikely fact, as we have pointed out. Another objective was to contradict the testimony given on the trial as to the willingness of the witnesses to accept the poultry parts. Both of the witnesses refused

to change their testimony on the basis of the prior affidavits, and insisted that when they referred to Kraus or M. Kraus or Max Kraus, they meant the concern and not Max Kraus individually, a most likely explanation. In the case of the third witness no attempt was made to get him to testify to more than the fact that he had seen Max Kraus at the time of his transactions. During the examination of these witnesses many of the questions and answers previously alleged to have been given by them were read in the presence of the jury (R. 116-121).

During the examination of Max Braverman, he was shown Government exhibit 13 for identification, which the prosecutor claimed was a prior affidavit of the witness. Defense counsel asked that he be permitted to examine the statement, referring to the *Snowy-Vacuum* case, and to this Court's observations therein as to discretion. The trial court said (R. 91), "I haven't been exercising any discretion. *I would hold that the United States had an absolute legal right to insist on doing precisely what it has done.* I will deny your application, which I understand is for permission to read what the witness has read." Defense counsel said, "My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based." The trial court replied, "*I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.*" Defense counsel took an exception (R. 91). (Italics ours.)

After Max Braverman had left the witness stand, the Government called an O.P.A. investigator who testified that he had taken Max Braverman's affidavit on December 3, 1943, and identified Government's exhibit 13 for Identification as being such affidavit. The answers had been written down not by Max Braverman but by the O.P.A. investigator. For the first time the Government then offered the affidavit

in evidence, it then being too late to employ it upon the cross-examination of Max Braverman. The court excluded the affidavit (R. 100-103).

In the subsequent examination of Harry Moskowitz a similar affidavit was employed, with access thereto refused to defense counsel, and defense counsel's objections to the reading in the presence of the jury of questions and answers therefrom was overruled (R. 115).

In summing up to the jury the prosecutor referred to these affidavits as being documents "in which it was said that Max Kraus either was there, officiated, attended or was aware of the sales" (R. 233). The court stated to the jury that he was allowing this as "an explanation bearing on Max Kraus' knowledge", at the same time instructing them "that as a statement of fact the contents of those statements, if they were made, are not before you as the District Attorney's statement as to what they contain is not to be considered by any of you" (R. 234). Here, of course, one statement canceled out the other.

Both at the conclusion of the Government's case and at the conclusion of the whole case the defendants moved to dismiss the various counts in the two Informations for failure of proof and failure to set out sufficient causes of action (R. 157-160, 228-9).

In summing up the prosecutor strongly emphasized to the jury that he had claimed that the price of chicken feet was 3 to 5¢ a pound and had done it five times (R. 230). There was no evidence to support this statement. He also stated to the jury that the maximum fine upon each count was $1,000, without the trial court correcting the statement (R. 233).

In charging the jury the trial court said of the evidence which we here contend was the most important, material and relevant evidence conceivably available to the defense (R. 236): "There was a complaint made that I excluded evi-

dence or something that could have been proved. *The law of evidence excludes all claptrap and poppycock.* Anything else is admissible. The best illustration I can give is right before you as a jury, where I first excluded one butcher from talking about his sales of chicken feet, and because subsequent testimony made an issue of what he was going to testify to, if you will remember, I allowed him to be recalled to testify. I have excluded no evidence, but I have excluded all claptrap; that is why I am here, to exclude that. You are not to assume that any injustice has been done anybody because I did not do any injustice" (Italics ours).

Contrary to the statement in the prevailing opinion of Evans, *C.J.* (R. 276), an exception was expressly reserved to this part of the charge (R. 243).

On the other hand, the trial court told the jury with respect to the Government's testimony in the same connection that "the use that can be made of them (the poultry parts), would enable the jury to determine *whether the prices at which they had been sold were entirely out of line with any value that attaches to them*, so that the prices charged therefor would be *almost entirely profit to the defendants*, and whether in thus selling the additional articles the defendants both realized a greater consideration than the O.P.A. allows for the commodity sold" (R. 241). (Italics added.)

Defense counsel excepted to the portion of the charge wherein the jury was advised that chicken skin, gizzards and feet were useless (R. 243).

The trial court further charged that any salesman has the assumed authority to represent the corporation, and that the corporation is liable for any sale effected by any of them (R. 241).

When the verdict came in, defense counsel moved to set it aside as against the weight of the evidence (R. 245).

Specification of Errors to be Urged*

The Circuit Court of Appeals erred:

(1) In holding that the trial court correctly ruled that offenses against the United States were sufficiently alleged in each of the counts of the two Informations (R. 272-3, 157-8, 228);

(2) In holding that the motions of petitioner corporation for directed verdicts were properly overruled (R. 272-3, 157-160, 228-9);

(3) In holding (R. 272) that the trial court was justified in finding that there was sufficient evidence to permit the jury to convict petitioner corporation of a wilful violation of ceiling prices, the sales having been made by its inferior agents;

(4) In failing to hold (R. 332) that the trial court committed reversible error in ruling that evidence offered by the petitioner corporation as to the demand for poultry parts and to show the lack of excessiveness in the price charged therefor, was inadmissible (R. 39, 162-4);

(5) In holding (R. 276) that the characterization of the foregoing evidence by the trial court as "claptrap and poppycock" was not erroneous, exception thereto having been duly taken (R. 243);

(6) In holding (R. 273-6) that the trial court was justified in refusing, without purporting to exercise any discre-

* Assignments of Error in the Circuit Court of Appeals, Nos. I, A, B, C & D, II, III, IV, A, D & E, V, VII, VIII (R. 253-267).

tion, to permit counsel for petitioner corporation to examine certain documents shown to witnesses called by the Government for the ostensible purpose of refreshing their recollections (R. 91);

(7) In failing to hold that it was reversible error for the trial court to permit the prosecuting attorney to erroneously advise the jury, without correction, that the maximum fine that could be imposed upon any count was $1,000 (R. 233) whereas in fact a fine of $2,500 was imposed on each count;

(8) In holding that the cumulative sentences imposed by the trial court of $2,500 upon each count were properly imposed, despite the aforesaid statement of the prosecuting attorney to the jury.

ARGUMENT

I

The sole issue presented by the informations and tried under the rulings of the Trial Court was whether or not the sale of poultry at ceiling prices was conditioned upon the sale of poultry parts, irrespective of whether or not an excessive price was charged for the latter, whereas the sole issue under the Ptice Control Act of 1942 and regulations in force at the time of the alleged violations was whether or not an excessive price was charged for the poultry parts when sold with poultry for which ceiling prices were charged. The informations were therefore wholly insufficient, and it was clear reversible error to try the case on such a basis.

It is clear beyond argument that the sole issue presented by the Informations and tried under the rulings of the trial

court was as above stated. The allegations in each count of the two Informations are in the same form. Taking, therefore, the first count in the first Information (C117-64) as typical, it reads as follows (R. 2-3):

> "That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation * * *, and Max Kraus, the defendants herein, in connection with the sale by them on said date to Harry Moskowitz of 875 pounds of poultry, * * *, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Harry Moskowitz to purchase a commodity, to wit, 427 pounds of chicken feet at 15 cents per pound as a condition of the sale to him of the aforesaid poultry; * * *".

There is no allegation whatsoever that either an above-ceiling price or an excessive price was charged for the chicken feet. Thus all that is charged is that the sale of the chicken feet was tied in with or conditioned upon the sale of the poultry. This was the issue and the only issue which was tried under the very explicit rulings of the trial court, despite the fact that the applicable "evasion" regulation did not specifically prohibit combination, conditioned or tied-in sales.

It is our contention, and we think it is plain, that quite a different issue ought to have been tried in view of the provisions of the Price Control Act of 1942 and the existing regulations of the Price Administrator thereunder, to wit, that the sole issue ought to have been whether or not (in view of the fact that it is conceded that all of the poultry was sold

at the ceiling price) an excessive or above-ceiling price was charged for the poultry parts.

Upon the issue which was tried much evidence was admitted concerning the inability or supposed inability of the retail butchers, who were the Government's witnesses, to dispose of the secondary products they had purchased. Such evidence was unquestionably relevant upon the issue of whether or not the price charged therefor by the petitioner corporation was excessive. No such issue was, however, permitted to be tried, and the evidence in question was accepted solely for the purpose of showing that the Government's witnesses did not willingly buy the secondary products. This was the sole issue which under the rulings of the trial court was tried. The evidence was of course relevant upon this issue.

So defining the issue, the trial court ruled in unmistakable terms that the defendants were not entitled to offer evidence to prove that there was such a demand for the secondary poultry products sold by petitioner corporation that the price charged therefor could not be regarded as excessive. This evidence was in fact clearly relevant and highly material even upon the issue to which the trial court had restricted the trial, because it is plain that the more clearly it should appear that the price charged for the secondary products by the defendants was not excessive, the less likely the claim of compulsion was apt to be true. Certainly the defendants did not have to accept the testimony of the Government's witnesses in this connection as conclusive. Yet that is just what they were required to do.

On the issue which, as heretofore stated, we contend ought to have been tried, the evidence in question was the only method open to defendants of proving the lack of excessiveness in the price charged and of rebutting the testimony of the Government's witnesses tending to show that the prices charged were excessive.

(1) The issue which ought to have been tried was whether or not an excessive or above-ceiling price was charged for the poultry parts.

The offense under the Price Control Act of 1942 is the sale or delivery of a commodity (Sec. 4a) in wilful violation of the maximum price regulations of the Price Administrator. As the prosecutor pointed out in his opening (R. 13), that is all there is to it. The test is a purely objective one, and not a subjective test from the standpoint of the particular buyer, differing with each buyer, and thus with each case. *The purpose of the Act is to promulgate price standards, not to protect individual purchasers against high-pressure selling or what may turn out to be bad bargains as far as they are concerned.*

Section 1429.5 of the Price Administrator's regulations prohibits evasion of the price limitations set forth in Revised Maximum Price Regulation No. 269 governing poultry

> "by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

There is no specific prohibition against tying agreements or conditioned sales or combination sales. Numerous other maximum price regulations, issued from time to time and going back to the commencement of price regulation, did specifically forbid such methods of selling. Thus in the meat industry itself the "offering, selling or delivering beef, veal or any processed product on condition that the purchaser

is required to purchase some other commodity" was prohibited under the heading "Evasion". Rev. M.P.R. 169, as amended March 30, 1943, Sec. 1364.406, 8 Fed. Reg. 4097, 4099. And in the clothing industry, under the heading "Prohibition", it was provided that "'No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." R.M.P.R. 287, issued June 29, 1943, Sec. 15, 8 Fed. Reg. 9122, 9126. The prohibition of evasion by "tying-agreement" was commonplace.* A later regulation in the same industry forbade "combination sales" in the following terms, "Every person is prohibited from requiring any purchaser to buy or agree to buy any other article, service, package or wrapper in connection with the sale or delivery of any garment covered by this regulation. Every person is likewise prohibited from making a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." M.P.R. 330, as amended August 7, 1943, Secs. 1389.555, 8 Fed. Reg. 11041, 5.

Thus, if such a prohibition per se, and not as a method *of evasion*, is to be read into the regulation, those whose only remedy against an invalid regulation is the protest and review procedure provided for in Secs. 203 and 204 of the Act, will have been effectively deprived of any remedy, for it is plain that they could not anticipate any such reading-in.

* E.G., Canned Vegetables (M.P.R. 152, Sec. 1341.25), effective May 23, 1942, 7 Fed. Reg. 3896; New Formula Condensed Soups (M.P.R. 181, Sec. 1341.39), effective July 18, 1942, 7 Fed. Reg. 5562; Canned Fruits and Berries (M.P.R. 185, Sec. 1341.105), effective July 24, 1942, 7 Fed. Reg. 5774; Frozen Fruits, Berries and Vegetables (M.P.R. 207, Sec. 1341.2 5), effective August 18, 1942, 7 Fed. Reg. 6600; Fruit Preserves, Jams and Jellies (M.P.R. 226, Sec. 1341.307), effective September 21, 1942, 7 Fed. Reg. 7492; Certain Packed Food Products (M.P.R. 306, Sec. 1341.567), effective January 22, 1943, 7 Fed. Reg. 1116; Dairy Products (M.P.R. 289, Sec. 61, effective December 20, 1942, 7 Fed. Reg. 10206.

The Second Revised Maximum Price Regulation No. 269, effective December 23, 1944, Sec. 1.3, 9 Fed. Reg. 15095, 15096, added the words "by tying agreement" to the prohibition against evasion (Part 1429, Sec. 1.3d). It did not prohibit tying-agreements *per se*. This makes it entirely unnecessary to consider whether or not a *per se* prohibition would be effective,—a very doubtful matter indeed in view of exclusively anti-inflationary purpose of the Act and the prohibition against interfering with established business practices (Sec. 2h).

A reading of the committee reports and debates in Congress in connection with the Price Control Act of 1942, as well as its preamble, shows with great clarity what the purpose of the Act was, i.e., to check inflationary price rises due to heavy defense and war expenditures by the Government and the accompanying severe reduction in the volume of goods available for civilian use.

The act does not guarantee to anyone the right to purchase scarce commodities apart from other commodities in greater supply. In many businesses, prior to the Act, combination sales were a well-established practice, frequently employed to move less sought-after goods. In the tobacco business, for example, as is shown (R. 4865) by a record now before this Court (*The American Tobacco Company, et al.* v. *U. S.*, Nos. 18, 19 and 20, October Term, 1945), the so-called drop-shipment or combination offer employed to move lesser-known brands of smoking and chewing tobaccos has been commonly used since 1886.

In the ice-cream business, at least since the war, it has been common practice to offer the public nothing but brick ice-cream, made up of alternate layers of ice-cream and water ice, with the obvious (and we submit desirable) purpose of making the scarcer product go further.

As is well-known, many restaurants for years have fol-

lowed, the practice of offering table d'hote meals without giving the option of buying the various dishes separately. Would it be seriously contended that, in the absence of ceiling prices fixed for the meal as a whole, the sale of such combinations would violate a regulation which merely fixed the price of the entree, if it should appear that the total price charged for the meal was no more than the aggregate of the ceiling price of the entree plus reasonable prices for the soup, dessert, etc.? If not, would the mere fact that the particular patron did not care for soup or dessert, and could not therefore effectively utilize such parts of the meal, change the situation? Though the answer is plainly in the negative, the trial court answers the question in the affirmative (R. 39, 162-3).

Finally, as bearing upon the failure of the Price Administrator to prohibit combination sales of poultry and poultry products, it ought to be clear that the meat industry is peculiarly one in which customers may properly be asked, particularly in war-time, to take some of the less-wanted parts or cuts along with those most in demand*. A steer weighs from 600 to 800 pounds. It will yield not more than 10 pounds of filet mignon. The other choice cuts come from the ribs, which, including the bones, weigh some 75 pounds, and the short loins, which weigh some 80 or 85 pounds and yield about 15 pounds of porter-house steaks, etc. Thus three-quarters or more of the steer yields the less-desired cuts of meat.

Meat, poultry and poultry parts are of course perishable. The supply thereof is fluctuating. Naturally there is great variation in the relationships between the available amounts of the cuts and parts in greatest demand and the less-desired cuts and parts.

* It will be noted that the specific prohibition in Rev. M.P.R. 169, referred to above, which regulates the sale of beef and veal, is against conditioned sales of "*some other commodity*".

Is the seller, under such circumstances, to have his hands tied in attempting to dispose of such less-desired cuts and parts, at prices which are not excessive, along with the scarce choice cuts and articles for which the demand is so great? If the seller's hands are so tied, would this tend to effectuate the purpose of the Act in combatting inflation and in attempting to provide the country with acceptable foods in war-time at reasonable prices? We think it is indisputable that under war conditions the complete utilization of all products useful in food-making is not only highly d able in the public interest, but is clearly anti-inflationary, in that it increases the supply of food in relation to the amount of money and credit outstanding, and that the Act and regulations, not so specifying, should not be construed to prevent it.

(2) The issue which was tried under the rulings of the trial court was not the issue which ought to have been tried.

We have heretofore pointed out that neither Information charged that the price obtained for the secondary products was above ceiling or excessive. The Informations therefore charged offenses, i.e., the conditioning of the sale of poultry upon the purchase of secondary poultry products, which were not in fact offenses either under the Price Control Act or under the regulations issued pursuant thereto. In other words, the prosecution had defined synthetic offenses, and the Informations were clearly insufficient.

At the very outset of the case the trial court recognized that the issue posed by the Informations was as above stated. He therefore ruled, with the concurrence of the prosecutor, that it was immaterial whether or not gizzards had been sold within a ceiling price, going so far as to say he would not care if the ceiling price of gizzards was $15.00, that it would not make any difference in the case (R. 39). Actual-

ly there was no ceiling price for gizzards at the time, so the real question ought to have been whether the gizzards were sold at an excessive price.

This was an important issue even under the theory of the Information as recognized by the trial court, because the excessiveness *vel non* of the price charged for the poultry parts was very material to the question of whether or not they had been voluntarily accepted by the purchasers.

In offering this testimony, defense counsel said (R. 162), "I intend putting in testimony here to show that there is and has been a demand for chicken skin, chicken feet, gizzards, that they are customarily sold, that they are bought; that they are dealt and traded in. The Government has inferred through all of its testimony that chicken feet and chicken skin are so much waste, that they are dumped, and that they are not used, and they have opened up the door to this type of testimony." The trial court not only sustained an objection by the prosecutor to this testimony and to a specific question asked the witness in this connection but explicitly and definitely ruled that the demand for chicken feet was not an issue and that "the only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores" (R. 162). He thus applied a purely subjective test, whereas he ought to have applied a purely objective test.

This ruling was in response to a second attempt of defense counsel calling the trial court's attention to the fact "that similar testimony from the opposite viewpoint, that chicken feet were not in demand, was offered and allowed in evidence" (R. 162).

After the court had so ruled, defense counsel for the third time questioned the propriety of the ruling, saying that he did not think that the issue presented by the Informations restricted the testimony to the demand for poultry parts in

the stores of the Government's witnesses (R. 162). The trial court then stated, "Well, maybe you don't think so but that is going to be the question in this case." He told counsel that he had sustained an objection to this type of testimony, that he had an exception and not to waste any more time about it (R. 162-3).

Defense counsel then brought the matter up for the fourth time and asked for an explicit ruling on the entire line of testimony, "before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the like. I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections" (R. 163).

Upon this fourth attempt of defense counsel to have the issue clearly defined, the trial court sternly ruled, "It is not only unnecessary but I *direct you not to do it*. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it" (R. 163). (Italics ours.)

Not completely satisfied with this, defense counsel made a fifth attempt and called Benjamin W. Reiner, a retail butcher (R. 163). When he asked him if he had purchased any chicken feet from Kraus, the prosecutor objected, and the court sustained the objection (R. 164). He not only sustained the objection but sharply remarked, "Did you understand what I said?" Defense counsel said that he understood that the trial court had said "sustained", and that he further understood that all of the trial court's rulings were going to be the same in respect of all of the witnesses that he proposed to put on the stand (R. 164).

Whereupon the trial court took pains to make certain that defense counsel had fully understood his stern admonition against further attempts in this direction and said, "Well, didn't you hear me tell you that *I direct you not to put them on the stand!*" (Italics ours.) Defense counsel then said that he now perfectly understood and would not put any other witness on the stand to testify to that effect (R. 164).

Nothing more happened in this connection upon the Government's case. When, however, Max Kraus, the individual defendant, was called to testify in his own defense, he was cross-examined about the market prices of chicken skin and chicken feet and the demand therefor. Without in the least changing his ruling, made in the course of the Government's case so definitely and explicitly, as we have pointed out, the trial court permitted David M. Bingard to be recalled and to testify to the price he himself had individually obtained for chicken feet (R. 194-5).

This witness, however, was not qualified to testify as to the demand for chicken feet generally (R. 195). Defense counsel, having in mind the stern admonition of the court which was still in effect (R. 277) and which went to the verge of threatening him with contempt, thereafter attempted to call no witnesses to testify to the demand for chicken feet generally and called no witness at all to testify to the demand for chicken skin. Thus the defense did not have the benefit of the testimony of the numerous disinterested witnesses it had offered to call to testify as to the demand for these products and what could be considered as not being excessive prices therefor.

It is too clear for argument, we submit, that the introduction of such testimony was prevented by the plain and explicit rulings of the trial court previously adverted to. If, therefore, as we believe we have indisputably shown, such

testimony was admissible, there was clear reversible error, since the testimony was plainly of the highest importance and materiality upon what ought to have been the sole issue in the case, if the charge had been legally sufficient, and was indeed highly material to the issue actually tried.

This error was clearly recognized by Hincks, *D. J.*, dissenting, who said (R. 277): "The judge must have overlooked the tendency of such evidence to negative an inference that the sales were made with evasive intent. It was admissible on that fundamental issue, and its exclusion was erroneous." He further pointed out that the error was never cured, despite the slight amount of testimony that was permitted in this connection because "the judge's exclusionary direction was still in effect and the defendant's other witnesses were never heard", presumably being no longer available by reason of their having been excused.

II

A corporation, as principal, may not, under the doctrine of *respondeat superior*, or otherwise, be convicted of a criminal offense required to be wilfully done, by reason of the acts of its inferior agents, which no governing officer has had knowledge of or has directed, authorized or acquiesced in.

(1) The Facts.

Max Kraus, the only governing officer of petitioner corporation whose name is mentioned in the record, was acquitted by the jury. Dealings with purely subordinate agents* of petitioner corporation, in respect of allegedly

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*Three of the witnesses did not even identify the employees who served them (R. 109-110, 56, 68). The others identified them merely as "Charlie", "Oscar", Mr. Blankenstein, Mr. Balter and "Meyer" (R. 84, 86, 75, 144-5, 148), and as bookkeepers or salesmen. The Government called none of these witnesses.

conditioned sales, were the sole basis for the convictions on each and every count. No witness upon any of these counts testified that he had been served, *in respect of such sales*, by an employee even as high in the scale as a branch manager, the dealings of some of them with Nathan Lotto having been restricted to suggestions or inquiries concerning the purchase of turkeys. Thus it is unnecessary to decide whether the acts of Nathan Lotto, in charge of the 14th Street and Ninth Avenue establishment, could bind the corporation without any governing officer participating therein or having knowledge thereof*. None of the foregoing witnesses testified that Max Kraus, the President of petitioner corporation, who was the only governing officer thereof mentioned in the record, participated in any of the allegedly conditioned sales or had knowledge thereof. Max Kraus categorically denied that he had ever instructed any employee to make the acceptance of poultry parts a condition of the sale of poultry (R. 177).

The sales, moreover, on which the convictions were obtained, which totalled less than $200 for the poultry parts, could hardly have been more sporadic or more casual, all of them having taken place during the three-day period prior to Thanksgiving, 1943. Thus it cannot be argued that any imputation of corporate knowledge is properly to be made in this case by reason of the frequency of the offending.

(2) The Applicable Rule of Law.

Professor Francis B. Sayre, in a thoroughly documented, well-reasoned and scholarly article, entitled "Criminal Re-

* Lotto, although termed a "manager" of the 14th Street and Ninth Avenue house (which was only a few blocks from the main administrative offices at Tenth Avenue and 14th Street) seemingly held a position more like that of a receiving clerk and salesman for trucked-in poultry. In appraising the propriety of imputing his acts and his state of mind to the petitioner corporation, what counts, of course, is not the name attached to the position but the authority exercised.

sponsibility for the Acts of Another" (1930), 43 Harvard Law Review, 689, discusses the comparatively recent introduction of the doctrine of *respondeat superior* in tort law, the development of which he contrasts with what, as he points out, has been the completely different development of responsibility for the acts of another in the criminal law. At the outset he states (p. 689):

> "The problem of the criminal liability of a corporation for the acts of corporate agents depends upon a consideration of two quite distinct problems, one a problem of agency, and the other a problem of the law of corporations."

He notes that the first problem involves the general question of criminal responsibility for the acts of another, and that the question is the same whether the principal is a natural person or a corporation. The second problem involves the entirely distinct question "of when the acts and intent of a natural person, for example of a vice-president or general manager, are to be treated as those of the corporation itself". It is the first question with which his article and our argument is solely concerned.

As noted by Professor Sayre, many courts in recent years have fallen into the error of bodily transferring the doctrine of *respondeat superior* from the civil law into the criminal law, thereby imputing the criminal acts and intent of an agent to his natural or corporate principal. This tendency, he observes, apart from the libel and nuisance cases, has been largely, if not exclusively, confined to petty misdemeanor cases not involving imprisonment or other than light fines, particularly the liquor cases. On the other hand, even with respect to the liquor cases, he says:

> "An imposing array of cases hold that even in these there can be no liability without proof of authorization or knowledge" (p. 715).

Professor Sayre conclusively demonstrates that the doctrine of *respondeat superior*, which imposes civil liability upon a master or principal for the acts of his servant or agent, within the scope of his employment and in the course of the business, is of comparatively recent origin. He notes (p. 691) that

> "the recorded cases between 1300 and 1700 indicate a growing recognition that the master's liability for his servant's acts should in general be confined to cases where the master specifically commanded or authorized the servant to commit the tortious act or gave his consent to it either before or after its commission."

Shortly before 1700, however, a great change was initiated by the decisions of Lord Holt, and the requirement of an express command or consent with reference to a particular act gave place to a command implied from general authority. Since the principal under this doctrine cannot escape liability even by proving that the tort was committed against his express command, the liability is frequently without fault and quite outside the ordinary principles of causation, which as we shall show are the essential factors in criminal liability. Even Lord Holt, however, drew a sharp line of distinction between criminal and civil liability for the acts of one's agents when, in *Hern* v. *Nichols*, 1 Salk. 289 (1708), he declared, "that the Merchant was answerable for the deceit of his factor, tho' not *criminaliter*, yet *civiliter*".

The development of the criminal law concerning vicarious responsibility is discussed by Sayre, *ibid.*, pp. 694-701. One who counseled, procured or commanded the commission of a crime through a guilty agent was an accessory before the fact. It was the actor who was the principal, not vice versa as in the tort terminology. Fault and causation were the foundations for the responsibility of the accessory. The

classic statement of the law in this connection, which has furnished the foundations of the criminal law upon the subject with comparatively little change until the present day, is given by Plowden (Sayre, *ibid.*, p. 698).

In *Rex* v. *Huggins* (1730), 2 Strange 882; 2 Lord Raymond 1574, the question of whether or not the doctrine of implied command, initiated by Lord Holt, should be applied to the criminal law was squarely presented, and definitely decided in the negative. In 1812 when Paley wrote the first treatise which was written on the law of agency, he stated the law almost in the same language as used in *Rex* v. *Huggins*, in discussing criminal liability for the acts of an agent. This was as follows, *Paley, Principal and Agent* (1812) 195-96:

> "The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behaviour. To affect the superior criminally by the act of his deputy, there must be the command of the superior for the act in question."

Professor Sayre then points out that "succeeding decisions and text-writers have made it clear that as a general rule the doctrine of *respondeat superior* will not serve as a ground of criminal liability" (p. 701).

Of course, as stated by *Blackstone* in his *Commentaries*, the fourth book of which was published in 1769,

> "He who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other." 4 Bl. Comm. *38.

In *The Queen* v. *Holbrook*, 4 Q.B.D. 42, 46, 47, 51 (1878), Lush, *J.*, said:

"The maxim 'respondeat superior' * * * with rare exceptions (i.e., cases of public nuisances) * * * pertains to civil liability only * * * If a coachman, accustomed to drive were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another; the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter * * * Subject to the exceptions already referred to, the criminal law makes no one punishable for an offense but the person who either committed it or incited and procured the other to commit it, or who aided in its commission. * * * Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim 'respondeat superior,' which on grounds of policy and general convenience put the master in the same position as if he had done the wrong himself, a maxim, which, as I before observed, pertains to civil and not, except in rare instances to criminal liability."

See also *Chisholm* v. *Doulton*, 22 Q.B.D. 736 (1889), in which Cave, *J.*, said, at 741:

"A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice."

Hardcastle v. *Bielby* (1892), Q.B. 709, in which Collins, *J.*, said, at 712:

"It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant."

In 16 *Corpus Juris* 123, the rule is stated as follows:

> "The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. Therefore, the mere relation of principal and agent, or of master and servant, does not render the principal or master criminally liable for the acts of his agent or servant, although done in the course of his employment; it must be shown that they were directed or authorized by him. Moreover, a clear case must be shown."

To the same effect is *Mechem on Agency*, Vol. 2, *Second Ed.*, Sec. 2006, wherein it is stated:

> "As a general rule he (the principal) cannot be held criminally liable for the act of his agent committed without his knowledge or consent."

The modern decisions in petty misdemeanor cases, and to some extent in the case of more serious crimes, reveal, however, two conflicting tendencies in respect of imposing vicarious criminal liability. The first is based upon strict principles of causation "as consecrated by centuries of practice". The second is based upon a transfer of the doctrine of *respondeat superior* from the law of torts. Of this latter tendency Professor Sayre says, page 702:

> "This second line of approach, by departing from ordinary principles of causation and from the fundamental, intensely personal, basis of criminal liability, violates the most deep-rooted traditions of criminal law. Vicarious liability is a conception repugnant to every instinct of the criminal jurist. It is not surprising, therefore, that courts today as a general rule reject the

second line of approach and make criminal liability exclusively dependent upon causation.

Such causation may be proved either by authorization, procurement, incitation or moral encouragement, or by knowledge plus acquiescence.

In the majority of tort cases in which the doctrine of *respondeat superior* is invoked, the problem is primarily one of settling the incidence of the loss. In the criminal law the problem is vitally different. As Professor Sayre says, page 718, "No one yet has been able to explain exactly why one should be liable in tort for the unauthorized acts of one's servants." Various suggestions have been made, but of these it is said, "Whether the true basis be one or more of these, it seems clear that none will afford justification under modern conditions for criminal liability."

(3) Application of the civil doctrine of *respondeat superior* to a criminal case is particularly inappropriate when what the statute prohibits is wilful violation or when it requires a specific intent.

The prohibition of the statute is solely against "any person who *wilfully* violates any provision of section 4 of this Act". (Italics ours.) A mere inadvertent or negligent offending is not punished. The criminal provisions of the Act were designed to punish the "most flagrant" violators (Senate Report No. 931, 77th Cong. 2nd Sess., Jan. 1, 1942), while other violations were reached by injunction, triple damage suits and licensing (Sec. 2, sub-divisions a, e and f).

As heretofore shown, neither the corporation nor any governing officer thereof had any knowledge of the alleged violations upon which the convictions were obtained, much less acquiesced therein. If there was no knowledge on the

part of any governing officer, it is clear that there could be no wilfulness properly imputable to the petitioner corporation. "* * * Without the knowledge, the intent cannot exist." *U. S. v. Falcone*, 311 U. S. 205. Furthermore, "to establish the intent (to further, promote, and cooperate in an unlawful act), the evidence of knowledge must be clear, not equivocal." *Direct Sales Co. v. U. S.*, 319 U. S. 703, at page 711.

Very frequently legislatures in prohibiting certain conduct have prohibited it absolutely, without respect to whether or not it was engaged in "wilfully" or "knowingly". It is mainly in this type of case that a good many courts have held that a principal is criminally liable for the acts of his agent just as he would be under the doctrine of *respondeat superior* in the tort cases. When, however, the statute prohibits conduct only when it has been "wilfully" or "knowingly" engaged in, the cases recognize that the wilfulness or knowledge of the agent may not be properly attributed to the corporate principal unless the agent is a governing officer of the corporation, which term may include such an official as a general manager or other representative wielding the whole executive power of the corporation.

The distinction between the two classes of statutes is well illustrated by *U. S. v. Burroughs*, 65 Fed. 2d, 796 (C. App. D. C., 1933). In this case defendants were indicted under a statute for failure to report sums of money expended for an election. The statute also provided for heavier penalties for wilful failure to report campaign contributions. The court held that in the former case no specific criminal intent need be proved, while in the latter case it was essential to prove it.

Unless the legislature clearly makes it appear that proof of criminal intent is to be dispensed with, such proof is to

be regarded as essential. *State* v. *Shelondy*, 118 P. 2d 280 (N. M., 1941).

The use of the word "wilfully" or the word "knowingly" in a statute is very frequently the characteristic which distinguishes a statute requiring the proof of specific intent from a statute which does not require such proof. Thus in *Hargrove* v. *U. S.*, 67 F. (2d) 820 (C. C. A. 8th. 1933), the court reversed a conviction for wilfully failing to make an income tax return and for wilfully and knowingly attempting to defeat and evade the payment of income tax, by reason of the error of the trial court in refusing to charge the jury that a specific intent was essential to the proof of the offenses.

In *Commonwealth* v. *Mixer*, 207 Mass. 141, 146 (1910), and in *Commonwealth* v. *Jackson*, 28 Atl. (2d) 894 (Pa., 1942), the contrast between prior statutes prohibiting wilful violations and later statutes omitting these words was pointed out.

Leading criminal cases in the state and federal courts, involving the element of wilfulness or specific intent, which have rejected the doctrine of *respondeat superior*, are as follows: *U. S.* v. *Food & Grocery Bureau of Southern California*, 43 F. Supp. 966 (D. C. S. D. Cal., 1942) at page 971; *People* v. *Doble*, 265 Pac. 184 (Cal., 1928); *People* v. *Green*, 133 Pac. 334 (D. C. App. Cal., 1913); *U. S.* v. *Corlin*, 44 F. Supp. 940 (D. C. S. D. Cal., 1942); *State* v. *Woolsey*, 259 Pac. 826 (Mont., 1927); *Lovelace* v. *State*, 2 So. (2d) 796 (Miss., 1941); *People* v. *Canadian Fur Trappers' Corporation*, 248 N. Y. 159, 161 N. E. 455, wherein it was said at page 456: "the intent must be the intent of the corporation, not merely that of the agent"; *Grant Bros. Construction Co.* v. *U. S.*, 111 Pac. 956 (Ariz., 1911).

In New Jersey not even the failure of a statute to require proof of specific intent by the use of such words as "wil-

fully" or "knowingly" permits the charging of a principal with the commission of a crime unless he "aided, encouraged or connived at the perpetration of the crime done by the agent, *or that the illicit act was habitually done in the course of the business.*" (Italics ours.) *State* v. *Pinto*, 29 Atl. 2d 180 (N. J., 1942). This we submit is the proper rule, both from a rational and historical point of view, which ought to be applied in all cases with the possible exception of petty misdemeanour cases involving light fines and no-imprisonment.

(4) The analogous punitive damage cases, in which the law is also thoroughly settled to the effect that the wilfulness of an inferior agent cannot be imputed to his corporate principal.

By its decision in *Lake Shore & Michigan Southern Ry. Co.* v. *Prentice*, 147 U. S. 101 (1893), this Court laid down the law clearly and unequivocally that a corporation not shown to have participated in the wilful act of its employee, *through its governing officers*, cannot be punished for his act even though such employee has acted within the scope of his employment. In that case, a conductor in charge of one of the trains of the defendant railway company had assaulted a passenger and falsely arrested him. The passenger sued the railway company for damages and recovered both compensatory and punitive damages for the illegal act of the conductor. This Court, reversing the judgment, held that the defendant railway company could be held liable for compensatory damages but not for punitive damages in view of the fact that it had not been shown that the railway company participated in the offense *through its governing officers*.

Lake Shore was a civil case, of course, but it is wholly plain that the decision prescribes exactly the same treatment

for a criminal case involving the element of wilfulness. Thus this Court said at page 107:

> "Exemplary or *punitive damages*, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, *can only be awarded against one who has participated in the offence.*" (Italics ours.)

And, further:

> "In this court, the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or *criminal indifference* to civil obligations. But such *guilty intention* on the part of the defendant is required in order to charge him with exemplary or punitive damages. * * *" (Italics ours.)

The Court then pointed out how Mr. Justice Story, in the case of *The Amiable Nancy*, 3 Wheat. 546, speaking for this Court, held that the owners of an American privateer could not be punished through exemplary or vindictive damages for the act of the officers and crew of the privateer in illegally and wantonly seizing and plundering a neutral vessel and maltreating her officers and crew, without it being shown that such owners participated in the illegal acts.

This Court then points out (p. 108 of 147 U. S.) that the rule laid down in the case of *The Amiable Nancy* is not peculiar to courts of admiralty but is a common law rule to be applied in all cases in which the Federal jurisprudence must govern.

Discusing the libel and malicious prosecution cases, the Court says, referring to the principal, that "he is not liable to be punished by exemplary damages for *an intent in which he did not participate.*"

Referring to a New Jersey case, it says (p. 110):

> "* * * the Supreme Court of New Jersey said of punitive damages: 'The right to award them rests primarily upon the single ground—wrongful motive.' 'It is the wrongful personal intention to injure that calls forth the penalty. *To this wrongful intent knowledge is an essential prerequisite.*' 'Absence of all proof bearing on the essential question, to wit, defendant's motive—cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respondeat superior.*' 21 Vroom (50 N. J. Law) 484, 485. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Commonwealth* v. *Morgan*, 107 Mass. 199, 203; *Regina* v. *Holbrook*, 3 Q.B.D. 60, 63, 64, 70, and 4 Q.B.D. 42, 51, 60."

Further discussing the applicable law, the Court said (pp. 114-5 of 147 U. S.):

> "The law applicable to this case has been found nowhere better stated than Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, *but excepted to an instruction to the jury that 'punitive or vindictive damages, or smart money, were not to be*

allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.' *This instruction was held to be right*, for the following reasons: 'In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as *amounted to criminality*, which for the good of society and warning to the individual *ought to be punished*. If in such cases, or in any case of a civil nature, such exemplary damages as will *operate as punishment and teach the lesson of caution to prevent a repetition of criminality*, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, *unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty.*' 'Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, *and the criminality of it is as much against him as against any other member of society*, we think it is quite enough, that he shall be liable in compensatory damages, for the injury sustained in consequence of the wrongful act of a person acting as his servant.' *Hagan* v. *Providence & Worcester Railroad*, 3 Rhode Island, 88, 91." (Italics ours.)

This Court, in this well-reasoned opinion, thus laid down the following general principles:

(1) That exemplary or punitive damages are imposed for the same reason that penalties of fine and imprison-

ment are provided for criminal offenses: to wit, to punish the offender and to deter others from committing a like offense.

(2) The rule that a principal is not liable either in punitive damages or for the criminal act of an agent, although committed within the scope of his authority, is applicable to corporations as well as to natural persons.

(3) That it is the element of wilfulness which alike determines the right of the individual to punitive damages and the right of the state to claim criminal penalties in statutes such as ours.

Applying these principles to the facts of the case it was deciding, this Court laid down the applicable rule when it said (at p. 114 of 147 U. S.):

"The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce."

It then distinguished the case before it from *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, 608, in which an armed force of several hundred men, organized and commanded by the vice-president and assistant general manager of the railway company, attacked with deadly weapons the agents and employees of another company, saying (at p. 114 of 147 U. S.):

> "* * * This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, *by its governing officers*, participated in and directed all that was planned and done. 122 U. S. 610." (Italics ours.)

The Court therefore held that wilfulness could be imputed to a corporation only by reason of the knowledge or acts of "its governing officers".

The *Lake Shore* case has been consistently recognized as stating the Federal law ever since it was decided, and its doctrine has been regularly applied in admiralty as well as at common law. *The Amiable Nancy*, 3 Wheat. 546; *The Seven Brothers*, 170 Fed. 126 (D. C. R. I.); *Norfolk & P. Traction Co. v. Miller*, 174 Fed. 607 (C. C. A. 4th, 1909); *Pacific Packing & Navigation Co. v. Fielding*, 136 Fed. 577 (C. C. A. 9th). In *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.*, 103 Fed. 841 (C. C. N. D. Cal., 1900), aff'd 109 Fed. 369 (C. C. A. 9th, 1901), the lower court stated, p. 847, that the rule "has been unvaryingly followed."

The rule has been specifically applied in the cases of a branch manager of an insurance company and of a division

superintendent of a telegraph company, whose wilfulness was held not to be imputable to the corporate employers. *Aetna Life Insurance Co.* v. *Brewer*, 12 F. (2d) 818 (Ct. App., D. C., 1926); *Memphis Telephone Co.* v. *Cumberland Telephone & Telegraph Co.*, 231 Fed. 835 (C. C. A. 6th, 1916), where in at pp. 840-2 a test of wielding the whole executive power of the corporation as distinguished from authority over a part only of its affairs is suggested.

(5) The Cases Relied on by the Government.

The only case in this Court relied on by the Government is *New York Central Railroad Co.* v. *U. S.*, 212 U. S. 481, at pp. 492-6. This was an appeal from convictions under the Elkins Act for giving rebates upon shipments of sugar. The railroad company and its assistant traffic manager had been convicted. The evidence was clear that not only the assistant traffic manager but the general traffic manager had participated in the giving of the rebates (p. 490). The general manager of the New York Central and Fast Freight Lines of Buffalo, N. Y., had forwarded the cashier's draft for the rebates to the assistant traffic manager of the railroad company (p. 491). As noted by the Court, the principal attack here was upon the constitutional validity of the provisions of the Elkins Act which charged corporate common carriers with responsibility for the illegal acts of any of their officers, agents, representatives or employees acting within the scope of their respective employments (pp. 491-2).

This Court first addressed itself (p. 492) to the idea advanced by earlier writers on common law that a corporation could not commit a crime. It held that there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. It pointed out that the defendant had admitted at the trial that the gen-

eral freight manager and the assistant freight manager were persons authorized to fix the rates which were held to be illegal (p. 492). It further concluded that Congress had the power to charge the corporation, by express statutory provision, with the illegal acts of its authorized agents and officers in granting the rebates.

It is plain that this case is no authority whatsoever for the Government in our situation. The Price Control Act of 1942 does not attempt to impute to corporations the wilfulness or specific intent of its agents. In the *New York Central* case the propriety of such imputation by a court in the absence of specific statutory provision therefor was not even considered. Moreover, the superior agents of the railroad company whose acts were involved in that case were authorized by the corporation to do the very things which they did, to wit, to fix the rates to be charged for the shipping of sugar.

Minnisohn v. *U. S.*, 101 F. (2d) 477, 478 (C. C. A. 2nd 1939), held only that the guilty intent of officers of a corporation may be imputed to the corporation itself in order to prove the guilt of the corporation, and in that case the guilty individuals were the chief officers of the defendant corporation. We do not dispute this proposition, but it has no application to our case.

Zito v. *U. S.*, 64 F. (2d) 772, at p. 775 (C. C. A. 7th, 1933), involved convictions for conspiracy to violate the National Prohibition Act through the selling of corn sugar, a commodity peculiarly useful in the manufacture of intoxicating liquor. The evidence showed that there were few, if any, legitimate industries in and around the neighborhood in which the sales were made that required or could use the particular kind of corn sugar which the defendant corporation sold to appellant Zito and Capitol Products Co. Under the circumstances the Court evidently thought the evidence sufficient to fasten knowledge

of the sales made for illegal purposes by the agent of the corporation, upon the governing officers thereof.

The Government may also cite *U. S. v. Wilson*, 59 F. (2d) 97 (D. C. W. D., Wash., 1932). This was a case of the same type as the *Zito* case wherein a sales agent for Compressed Yeast Co., Inc. sold quantities of yeast for the illicit manufacture of alcohol and aided the buyer by advances of money and credit. The Court held that,

> "Where the agent is employed to sell a compound containing qualities and substances designed or intended for use in the manufacture of alcoholic liquors, or is popularly known to contain such qualities and is used for the purpose, the principal must see that such compound is sold by the agent in harmony with, and not antagonistic to, or against, the sovereign will."

It concluded (p. 98),

> "In the instant case the defendant had, no doubt, knowledge of the sale and the purpose for which used, or at least such as to put a reasonable person on inquiry."

In *Bowles v. Lee's Ice Cream* (Ct. of App., D. C., 1945), 148 F. 2d 113, large deliveries of beef were periodically received by a restaurant, without giving ration points, under such circumstances that knowledge and acquiescence on the part of its manager and practically sole stockholder seemed to the Court to be inescapable.

(6) Conclusion.

The entire matter is well summed up by Professor Sayre, *ibid.*, at p. 702 and p. 719 where he says:

"* * * Vicarious liability is a conception repugnant to every instinct of the criminal jurist. * * *

* * * * *

"* * * The rejection of *respondeat superior* in the case of all crimes other than petty misdemeanors is therefore the result of a thoroughly sound instinct. * * *"

In the case at bar the facts are clear. It cannot possibly be contended that the conditioning of the sale of poultry upon the purchase of poultry parts (assumed *arguendo* to have been indulged in by inferior agents of petitioner corporation) was the natural and probable consequence of instructing them to sell poultry parts. It was a separate and distinct matter. Thus under the centuries-old doctrine of the criminal law, petitioner corporation is not criminally liable for their unauthorized acts.

Nor is there any evidence upon which to found knowledge and acquiescence, or even knowledge alone, on the part of any governing officer of petitioner corporation. As in the very recent case of *State* v. *Pinto*, 29 Atl. 2d. 180 N. J. 1942), in which the conviction was reversed, there was not even any evidence that "the illicit act was habitually done in the course of business," since all of the alleged sales took place during a three day period prior to Thanksgiving, 1943.

The sanctions provided for in the Price Control Act of 1942 are by no means restricted to criminal penalties. Congress, as previously pointed out, intended criminal prosecution to be restricted to "flagrant offenses" involving "wilful" violations. For violations of another kind it provided for triple damage suits by injured persons and granted to the Price Administrator not only the privilege of applying for injunctions but the power to license and to revoke licenses.

There was, we submit, no excuse in this case for proceeding by criminal prosecution, in view of the fact that the aggregate amount charged for the poultry parts was less than $200 and in view of the casualness of the sales. Having chosen to so proceed, however, the Government should, we submit, be required to conform to the time-honored standards of the criminal law, which run counter to the concept of vicarious liability for acts and accompanying state of mind unknown and unparticipated in. Congress expressly provided that in order for the criminal penalties to apply the violations would have to be "wilful". In the case of "wilful" violations of a flagrant nature, the heavy penalties of a year in jail and $5000 fine for each offending may doubtless be considered appropriate. We submit, however, that before such penalties can be properly imposed, the sound standards of the criminal law must be met. It is very plain, we think, that in the case at bar they have not been met.

These consideration have particular force, it is submitted, when *the only governing officer of the corporation involved has been acquitted by the jury.* (Italics ours.)

III

It was reversible error for the trial court to deny, without exercising any discretion, the motion of defense counsel for permission to examine prior sworn statements shown to and read by witnesses upon the trial, and from which parts selected by the prosecutor were read to the jury.

In its brief in opposition to the petition for certiorari, *the Government admits* (p. 8) *"that the trial judge erred in stating that he had no discretion to permit examination of the statements"*. (Italics added.) Such admission is inescapable. In refusing defense counsel permission to examine the statements being shown to the witnesses, the trial court

said (R. 91), "I haven't been exercising any discretion. *I would hold that the United States had ... absolute legal right to insist on doing precisely what it has done.* I will deny your application, which I understand is for permission to read what the witness has read." (Italics ours.) Defense counsel took an exception (R. 91).

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pages 231-7, the question at issue is discussed at length. There were, however, circumstances in that case which led this Court to hold that the trial court, *in the exercise of its discretion*, did not commit reversible error in refusing defense counsel the right to examine grand jury testimony used to refresh the recollections of certain hostile witnesses called by the Government. There the court early in the trial adopted the practice of inspecting the transcript of the grand jury testimony in itself seeking to refresh the witnesses' recollections by reading from their prior testimony out of the hearing of the jury. *At no time was the transcript shown to the witness.* This Court held that the use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge (p. 233), and that "*Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness.*" (Italics ours.) The reasons it gave were "that only in that way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and 'detect circumstances not appearing on the surface' and 'expose all that detracts from the weight of testimony'."

It was then pointed out that the first of these reasons was irrelevant in the particular case because the witnesses were employees of the defendant and hostile. As to the second reason it was pointed out that "no iron-clad rule requires that opposing counsel be shown the grand jury transcript *where it is not shown the witness and where some appropri-*

ate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court." (Italics ours.)

This Court therefore concluded that there was no abuse of discretion in view of the manner in which the trial judge supervised the procedure. It warned, however (p. 234),

> "If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence."

It further pointed out that it clearly appeared (p. 235) that the use of the material was not prejudicial.

In our case the trial judge did not supervise in any way the use of the refreshing material. He permitted it to be shown to the witness, while at the same time refusing defense counsel the opportunity of examining it. He stated that he was not exercising any discretion in the matter and that the District Attorney had the *absolute legal right* to do what he was doing. Thus counsel was granted no opportunity to "detect circumstances not appearing on the surface" or to "expose all that detracts from the weight of testimony".

It was of the greatest importance to the petitioner corporation that the jury be not given the false impression that Max Kraus, its president, had personally participated in the transactions set forth in the Informations. He was the only "governing officer" of defendant corporation whose name was suggested in this connection. It was thus vital for the Government in order to convict the corporation to

connect him with some of these transactions. The fact that he was acquitted does not mean in the least that the jury may not have concluded (upon the basis of fragmentary impressions gleaned from questions and answers read from the statements shown to the witnesses and not upon the basis of the affirmative testimony given by them on the trial, which was to the contrary) that Max Kraus was involved. Obviously witnesses like these would be unlikely to distinguish carefully between M. Kraus & Bros., Inc., the corporation, its employees, and Max Kraus, the individual. It would be natural for them to refer to each as "Kraus". Without examining the context of the statements it is thus impossible to say what such a reference might mean. If the jury acted on such a basis, there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence".* Similar considerations would apply to the attempt to get at least one of the witnesses to say on the basis of prior statements that contrary to their testimony given on the trial they had been compelled to buy the secondary poultry products.

This Court relied in the *Socony-Vacuum* case (p. 233) upon *Wigmore, Evidence (2d ed.)*, sec. 762. This author there states that the justice of the rule requiring the exhibition to opposing counsel of all refreshing material is clear and that there is no principle to support the small minority of contra decisions.

Morris v. *U. S.*, (C. C. A. 5th, 1906), relied upon by this Court (p. 233) in the same connection, and wherein the

* That the jury very likely considered it as such appears from the fact that the judge who wrote the prevailing opinion for the Circuit Court of Appeals considered it as such, although the basis for his strictures based thereon (R. 275) was frail, since he excluded from consideration the distinct possibility, which cross examination might well have revealed, that the O.P.A. investigators did not correctly report the witnesses.

Court found reversible error in the refusal to permit examination of refreshing material, is a weaker case than ours. Nothing from the exhibited statements was read to the jury. As in our case, the statements themselves which were shown to the witnesses were not in the record, a bill of exceptions which reproduced none of the evidence being alone before the appellate court. In reversing the judgment the Circuit Court of Appeals said,

> "To permit the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted with the witnesses against him, and tends to deprive him of full opportunities to defend himself. We understand it to be the universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified."

Reference was made by the Court to a decision by Judge Cooley in *Duncan* v. *Seeley*, 34 Mich. 369, in which it was said,

> "It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum."

Nor can it be properly argued, as it is by the Government, that the admitted error was not prejudicial. It was clearly

prejudicial for the reasons stated, and, moreover, error is presumed to be prejudicial. *Mexia* v. *Oliver*, 148 U. S. 664, and *Vicksburg, etc. R. Co.* v. *O'Brien*, 119 U. S. 99. In the last named case this Court held that it was well settled that a reversal would be directed unless it appeared beyond doubt that the error did not and could not have prejudiced the right of the party. It cited, among other cases, *Gilmer* v. *Higley*, 110 U. S. 47. This was a negligence action in which the error complained of was the refusal to permit certain questions on cross-examination. The appeal was upon a bill of exceptions only, there being no evidence in the record. It was held that the questions were proper and the Court said it was "unnecessary for the court to see injury to the defendant".

> "We have not heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that when such court can affirmatively see that the error worked no injury to the party appealing, it will be disregarded" (p. 50).

IV

The cumulative sentences, in the amount of $2,500 each, totaling $22,500, which were imposed upon nine counts of the two Informations upon which the petitioner corporation was found guilty, ought to be set aside in view of the fact that the prosecutor incorrectly told the jury that the maximum fine upon each count was $1,000 and suggested that it was not customary to impose cumulative sentences.

On the pretext that defense counsel had told the jury that the individual defendant, if convicted, might receive cumulative jail sentences—which was true—the prosecutor,

in summing up, after telling the jury that this was none of its business, stated, "The maximum for each count in this court on this charge is one year in jail and $1,000 fine—one year in jail and $1,000 fine". He then went on to say that first offenders, second offenders, and even third offenders are never sentenced the maximum on each count (R. 233).

This statement to the jury, wholly erroneous in fact because the statute provides for a $5,000 fine on each count, was not corrected by the court, and the jury took the case under the impression that it was correct. Doubless it also believed that cumulative sentences would not be given. Nevertheless the court imposed cumulative sentences upon the nine counts upon which verdicts of guilty were found and in each case imposed a fine two and a half times that which the prosecutor had told the jury was the maximum.

It would seem to be too plain for argument that this was serious error which ought to call at the very least for reduction of the sentences, unless the failure of defense counsel to suggest a correction is fatal.

We respectfully suggest that that failure has nothing to do with the imposition of fines higher than $1,000 per count, and that, therefore, it has no bearing upon whether or not a re-sentencing should take place. In its other aspect, that is in respect of the effect of the statement upon the jury in inducing conviction by reason of its belief that the sentence would probably not exceed a fine of $1,000, it is necessary to say no more than that it has been frequently held that an appellate court will, in the exercise of sound discretion, notice error in the trial of a criminal case without there having been objection and exception, provided the error is sufficiently serious, which we believe this one to be. *Berger* v. *U. S.*, 295 U. S. 78; *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, at pp. 318 and 319; *U. S.* v. *Atkinson*, 297 U. S. 157, at p. 160; *Crawford* v. *U. S.*, 212 U. S. 183, at p. 194; *Brasfield* v. *U. S.*, 272 U. S. 448, at p. 450.

CONCLUSION

It is respectfully submitted that the convictions upon all counts should be reversed, and the Informations dismissed, in that (1) the Informations were insufficient in law, and the case as a whole was in consequence tried upon a completely erroneous theory, (2) relevant and material evidence offered by petitioner corporation and which went to the very heart of the case was excluded, (3) assuming *arguendo* the guilt of the inferior agents of petitioner corporation who handled the particular sales, neither their wilfulness or specific intent, nor their acts, can rightfully be imputed to petitioner corporation without at least knowledge thereof on the part of a governing officer, (4) the trial court committed reversible error in refusing to permit defense counsel to examine documents shown to certain of the Government's witnesses for the purpose *inter alia* of refreshing their recollections, and (5) it was improper for the trial court to permit the prosecutor, without correction, to grossly understate to the jury the amount of the fine which might be imposed under the statute upon petitioner corporation and thereafter to impose upon it fines largely in excess of the fine thus stated.

Respectfully submitted,

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